



IN THE MATTER OF:

Complainant,

VINYLGRAIN INDUSTRIES OF
ILLINOIS,

Respondent.

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CHARGE NO. **1996CA1087**
 EEOC NO. **21B960327**
 ALS NO. **11382**

RECOMMENDED ORDER AND DECISION

This matter is before me for resolution of damages after a default order was entered against the Respondent on September 6, 2000. At the scheduled November 13, 2000 damages hearing, Complainant appeared represented by counsel. Respondent failed to appear. Complainant submitted testimony and physical evidence as to his damages. Complainant declined an opportunity to submit a post hearing brief. Complainant did not file a Petition for Attorney's fees. This matter is ripe for decision.

INTRODUCTION

Complainant filed the underlying Charge in this matter on November 7, 1995 with the Illinois Department of Human Rights. A Petition for Default Order and Complaint for Damages was filed by the Department of Human Rights on May 2, 2000 with the Illinois Human Rights Commission. The Petition recites that a Notice of Default was issued in this case, the Respondent filed a request for review, but the default was sustained by the Chief Legal Counsel of the Department of Human Rights. On September 6, 2000, the Commission entered an Order of Default against the Respondent. On September 29, 2000, the Commission entered an order

setting the matter for a hearing on damages on November 13, 2000, at 9:30 a.m. A Hearing on damages was held on November 13, 2000, at 9:30 a.m. with Complainant and his counsel being present, and Respondent failing to appear.

COMPLAINANT'S CASE

Respondent, Vinylgrain Industries of Illinois, Inc., is a family owned corporation that sells home siding. Complainant was hired by Respondent in April of 1989. Angela Krieger was the operations manager and owner of the company at the time of the alleged incident. Bruce Krieger, Jr., who is the son of Angela Krieger, was Complainant's immediate supervisor. Complainant states that he was working as an Area Director for Respondent and had a good work performance record. On July 22, 1995, Complainant fell and injured his right shoulder. Complainant stated that his shoulder was dislocated and fractured, and as a result was required to wear a sling. Complainant worked with difficulties and no accommodation until November 1, 1995 when he was terminated. Complainant stated that Bruce Krieger Jr. told him, "Turn in our sample cases and get your old fat ass out of here." Complainant further stated that Mr. Krieger mentioned his age (57 years old) and immediately replaced him with Tom (last name unknown), who was in his 30's and non-handicapped. Complainant also stated that in late 1993 or early 1994, Angela Krieger refused to give him a letter of recommendation for a condominium he was purchasing on the basis that he was "too old to be buying a condo." Complainant contends that he was discriminated against by Respondent due to his age and his physical handicap and that his termination was a direct result of the discrimination.

Complainant testified at the damages hearing that his medical insurance was cancelled by Respondent. Complainant presented medical bills to show the degree of Complainant's injury, but did not make the bills part of his damages. Complainant went on to testify as to his lost

wages, by way of documentation and testimony. Complainant testified that he found another job and was back on his feet around June or July of 1996, but his income never matched the one he was making while with Respondent. Complainant also testified as to the emotional pain and suffering he endured as a result of being discriminated against. Complainant stated he thought it was useless to try to get another job because he was worried about what another employer might think about him. Complainant also stated that he lost sleep because he was worried about paying his bills. The Complainant did not request compensation for medical bills or for loss of insurance coverage, nor was a petition for attorney fees or costs filed with the Commission.

RESPONDENT'S CASE

Respondent failed to appear and presented no evidence in this case; therefore, Complainant's case remains uncontested.

FINDINGS OF FACT

The Commission panel's decision to hold the Respondent in default is the law of the case. Once an order of default has been issued, liability is presumed. In the Matter of: Benjamin Clark and Phoenix Police Department, 1998 ILHUM LEXIS 212 (July 24, 1998). Therefore, the following facts are presumed to be admitted:

1. Complainant, Philip E. Harris, began his employment with Respondent in April of 1989.
2. On July 22, 1995, Complainant fell and injured his right arm.
3. Complainant continued to work in a satisfactory manner for Respondent as an Area Director in charge of sales, even though he was forced to wear a sling and had difficulties.
4. Respondent did not make any accommodations for his injury.

5. Complainant, who was 57 years of age, was fired from his position on November 1, 1995.

6. At the time Complainant was fired, his immediate supervisor, Bruce Krieger Jr., told him “to get your old fat ass out of here.”

7. In late 1993 or early 1994, the operations manager and owner of Respondent Company, Angela Krieger, refused to give Complainant a letter of recommendation to purchase a condominium because he was “too old to buy a condo.”

8. As a result of the firing, Complainant experienced emotional pain and suffering in seeking another job because he was afraid of what another employer might say about him. Complainant also experienced emotional pain and suffering from loss of sleep due to the worries associated with paying his bills.

9. As a result of the firing, Complainant suffered actual and emotional damages.

10. An order of Default was issued by a panel of the Commission on September 6, 2000 upon request of the Illinois Department of Human Rights after Respondent failed to file a verified response to the allegations contained in Complainant’s charge. Respondent filed a request for review, but the default was sustained by the Chief Legal Counsel of the Department of Human Rights.

CONCLUSIONS OF LAW

1. Complainant is an “aggrieved party” and Respondent is an “employer” as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 5/2-101(B)(1)(c), respectively.

2. The Commission has jurisdiction over the parties and the subject matter of this action by virtue of the Order of Default entered by a panel of the Commission on September 6, 2000.

3. In accordance with Section 7-101.1(C) of the Illinois Human Rights Act, the Commission is required to “enter a default order and set a hearing on damages” when a “default is sustained on review” by the Department.

4. As a result of the default by Respondent, they are liable for violating Section 2-102(A) of the Illinois Human Rights Act, which prohibits civil rights violations by employers.

5. As a proximate result of Respondent’s discriminatory conduct, Complainant suffered actual and emotional damages.

DISCUSSION

This case came to public hearing on the issue of damages only because a default order was entered by a Commission panel against Respondent. Respondent did not participate in the public hearing on damages, and as such did not respond to any of the evidence presented by the Complainant concerning damages. The consequence of the default order entered in this case is that Respondent is liable for violations of the provisions of the Illinois Human Rights Act concerning handicap and age discrimination, and Complainant is entitled to an award based upon that liability. *See Glassworks, Inc. v. Human Rights Commission*, 164 Ill.App.3d 842, 518 N.E.2d 343, 115 Ill.Dec. 818 (1st Dist. 1987).

Lost Wages

Once liability is established, it is necessary to determine the nature of the injury suffered by Complainant and award relief as appropriate. The purpose of the damage award is to make

the Complainant whole. When the Complainant has been a victim of unlawful discrimination under the Act, he should be placed in the position in which he would have been but for the discriminatory act. Clark v. Human Rights Commission, 151 Ill.App.3d 178, 490 N.E.2d 29 (1st Dist. 1989). A prevailing Complainant is entitled to back pay from the date of his unlawful discharge until the date of the hearing; November 1, 1995 to November 13, 2000. Id.

It is well established that Complainant has a duty to mitigate damages by seeking other employment. Complainant fulfilled this duty by seeking and obtaining work during the years in question. Complainant is seeking lost wages in the amount of \$409,704.00. Complainant presented evidence that he was making an average gross commission of \$2,383.00 per sale, and testified that he made an average of two such sales per week. He estimated that his gross weekly salary was \$4,766.00. Complainant presented his 1996 and 1997 income tax returns, which showed his gross income to be \$5,112.00 and \$10,217.00, respectively. Complainant testified that he began to work his more normal financial pace for sales on June 7, 1996. Complainant calculated his lost wages for 44 weeks, subtracting 8 weeks or 2 bad months of the construction season in terms of mitigation. Complainant is requesting the amount of \$209,704.00 for lost wages based upon the one-year period in time from his firing until he began to work at his more normal pace. Complainant testified that he is still not making as much money at his present job then he did while with Respondents. Complainant testified that over the past five and a half years, given the adjusted gross income that he testified to and looking at it conservatively, he lost an additional amount of at least \$200,000.00. Thus, the total amount of lost wages Complainant requests is \$409,704.00. Respondent did not present any evidence to counter or contradict the amount Complainant is requesting for lost wages. Therefore, Complainant is entitled to \$409,704.00 for lost wages.

Emotional Distress

Complainant requests damages for his emotional pain and suffering he endured as a result of Respondent's conduct, which the Commission has held constituted handicap and age discrimination. Complainant requests the amount of \$429,112.00 for emotional pain and suffering as a reasonable and proper award in this case. Complainant basically testified that he was afraid of what other potential employers may say about him after being terminated by Respondent, and that he lost some sleep over worrying about making payments on his bills.

Under 775 ILCS 5/8-104(B), actual damages include compensation for emotional harm and mental suffering. However, the 1st District Appellate Court reminds the Commission to keep awards for emotional distress "within reasonable parameters." Village of Bellwood Bd. Of Fire and Police Commissioners v. Human Rights Commission, 184 Ill.App.3d 339, 541 N.E.2d 1248, 133 Ill.Dec. 810 (1st Dist. 1989). The presumption under the Act is that recovery of all pecuniary losses will fully compensate an aggrieved party for his losses. Smith v. Cook County Sheriff's Office, 19 Ill. HRC Rep. 131, 145 (1985). However, the Commission will award damages beyond pecuniary if it is *absolutely clear* from the record that the recovery of pecuniary loss will not adequately compensate the Complainant for his actual damages. (Emphasis added.) Kincaid v. Village of Bellwood, Bd. of Fire and Police Commissioner, 35 Ill. HRC Rep. 172, 182 (1987).

The Commission has consistently held that the mere fact of a civil rights violation, without more, even in cases of default, is insufficient to support an award for emotional distress. Smith and Cook County Sheriff's Office, 19 Ill. HRC Rep. 131, 145 (1985). In the case of Prince and Unibase Technologies, Inc., ___ Ill. HRC Rep. ___ (1996CF2435), Dec. 10, 1997), which was a default proceeding, the Commission held that because the Complainant had provided no evidence that the Respondent's conduct was continuous and outrageous and no

evidence of the effect of the Respondent's conduct on her beyond nonspecific, conclusory assertions of being upset, the Complainant was not entitled to an award of damages for emotional distress.

Under the circumstances recounted in the record, I find that the amount requested by Complainant for emotional pain and suffering is improper and unreasonable. The requested award does not fall within the reasonable parameters set out by the Appellate Court. I also find that the actual damages for lost wages is adequate in this instance to fully compensate the aggrieved party for his losses. I further find that the record is void of any evidence that Respondent's conduct was continuous and outrageous. Therefore, the Complainant is not entitled to any compensation for emotional pain and suffering.

RECOMMENDED LIABILITY DETERMINATION

Based upon the reasons stated above, I recommend the Illinois Human Rights Commission sustain the Complaint of *Harris v. Vinylgrain Industries of Illinois*, and further recommend that:

1. The instant Complaint be sustained on the claim of age and handicap discrimination.
2. The Respondent pay to Complainant lost wages in the amount of \$409,704.00 for the years 1995 until the date of this hearing.
3. The Complainant's request for monetary compensation for emotional pain and suffering be denied.
5. The Complainant not be granted attorney fees or costs associated with this matter.

HUMAN RIGHTS COMMISSION

BY:
NELSON E. PEREZ
Administrative Law Judge
Administrative Law Section

ENTERED: June 6, 2001